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statute are void even in the hands of a holder in due course.[38] Consequently, though no case was found, it seems safe to say that the court would allow the married woman to plead coverture even against a holder in due course. In other words, if the original payee cannot collect, a subsequent holder cannot. But there is a possibility of a case where the original payee can collect and a subsequent holder cannot, as where the latter has notice that the wife was in fact a surety.

It should be noted that, under the statute, there is no method by which a married woman can become personally bound as a surety, but it does provide that she can "set aside" her property as security for the debt of another. This is usually done by a mortgage,[39] but the indorsement of stock,[40] the pledging of notes as collateral,[41] and the pledging of the proceeds of an insurance policy (together with the actual delivery of the policy)[42] have been held to constitute "setting aside" within the meaning of the statute. This creates no personal liability but only a claim as to the specific property and only to the extent of that property.[43] In no case is there an enforceable claim for a deficiency remaining after the sale of such property nor can any other property be subjected to the lien.[44]

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LIABILITY OF RESTAURANT KEEPERS AS BAILEES OF WRAPS OF PATRONS

The liability of a restaurant keeper for clothing deposited by patrons while eating depends upon the establishment of a contract of bailment[1] or upon proof of the proprietor's negligence.[2] In order to constitute a bailment, there must be a delivery of the article, either actual or constructive,[3] and an acceptance of the subject matter, actual or implied.[4] The delivery of the article must be such

[38] See Lawson, et al v. First National Bank of Fulton, — Ky. —, 102 S. W. 324 at 325 (1907); Alexander and Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353 (1906).

[39] Brady v. Equitable Trust Co. of Dover, 178 Ky. 693, 199 S. W. 1083 (1918); Hall v. Hall, 26 K. L. R. 553, 82 S. W. 269 (1904).

[40] Staib v. German Ins. Bank, 179 Ky. 118, 200 S. W. 322 (1918).

[41] Staten, et al v. Louisville Trust Co., 289 Ky. 258, 158 S. W. (2d) 387 (1942).

[42] Wirgman v. Miller, 98 Ky. 620, 33 S. W. 937 (1896).

[43] Brady v. Equitable Trust Co. of Dover, 178 Ky. 693, 199 S. W. 1083 (1918); Magoffin v. Boyle National Bank, 24 K. L. R. 585, 69 S. W. 702 (1902).

[44] Tipton v. Traders' Deposit Bank, 17 K. L. R. 960, 33 S. W. 205 (1895).

[1] Maher v. Chaplin's Lunch, 119 Pa. Super. 213, 180 Atl. 739 (1935); 32 C. J. 558.

[2] Montgomery v. Ladjing, 30 N. Y. Misc. (Sup. Ct.) 12, 61 N. Y. Supp. 840 (1899); Simpson v. Rourke, 13 N. Y. Misc. (N. Y. City Cts.) 230, 34 N. Y. Supp. 11 (1895).

[3] Sproule, Armstrong & Co. v. Ford & Warren, 13 Ky. (3 Litt.) 25 (1823); 6 AM. JUR. 191; 6 C. J. 1102-3; 8 C. J. S. 248.

[4] 6 AM. JUR. 194; 6 C. J. 1104; 8 C. J. S. 249.

that it will enable the proprietor to exclude the possession of all others during the time of the bailment and place in him the sole custody and control of the article.[5] There must be an acceptance of the articles before a bailment can exist since the duties and responsibilities of a bailee cannot be forced upon one without his knowledge or consent.[6]

The problem of sufficiency of delivery is the great obstacle in holding a proprietor of a restaurant liable as a bailee. No distinct line is drawn by the courts as to what constitutes a sufficient delivery in order to hold the proprietor liable. It seems clear that where wraps are placed in a check room, a bailment is established and the proprietor is liable as bailee since he has the sole custody and control of the bailed articles.[7] The same holds true where the proprietor or his agent takes clothing of a patron and places it in a place unknown to the patron so that he must inquire as to its whereabouts or demand its return before acquiring possession.[8] This applies even though the articles are placed on a rack near the patron.[9]

In the foregoing situations, the element of acceptance plays a small role since there can be no question where the proprietor readily takes the wraps of a patron into his possession. However, the element of acceptance must be considered along with that of delivery in the situations to follow. A bailment did not exist where a waiter took the coat and hat of a patron and hung them near the patron's seat, the patron knowing where they were.[10] The act of the waiter was a mere act of courtesy and there was not a sufficient delivery where the articles were easily accessible. This view is confirmed by the decision in *Maher* v. *Chaplin's Lunch*[11] where a proprietor instructed a patron to place his coat on a hanger while the proprietor assisted him in finding a seat. There seems to be no diversity of opinion in the cases where wraps are placed by the patron upon hangers provided by the restaurant, for in such a case no bailment can exist since there has been no delivery or acceptance.[12] The hangers placed there by the restaurant are merely for the convenience of the customer and do not imply an invitation to the patron to establish a bail-

[5] Wood Livestock Co. v. Oregon Short Line R. R. Co., 50 Idaho 524, 298 Pac. 371 (1931); Hope v. Costello, 222 Mo. App. 187, 297 S. W. 100 (1927); Kee v. Bethrum, 146 Okla. 247, 293 Pac. 1084 (1930); 6 AM. JUR. 192; 6 C. J. 1103; 8 C. J. S. 249.

[6] See cases cited *supra* note 4.

[7] O'Malley v. Penn Athletic Club, 119 Pa. Super. 584, 181 Atl. 370 (1935).

[8] Tombler v. Knoelling, 60 Ark. 62, 28 S. W. 795 (1894); Vogelsang v. Fredkyn, 133 Ill. App. 356 (1907); Appleton v. Welch, 20 N. Y. Misc. (Sup. Ct.) 343, 45 N. Y. Supp. 751 (1897).

[9] LaSalle Restaurant v. McMasters, 85 Ill. App. 677 (1899).

[10] Apfel v. Whites, Inc., 110 N. Y. Misc. (Sup. Ct.) 670, 180 N. Y. Supp. 712 (1920).

[11] 119 Pa. Super. 213, 180 Atl. 739 (1935).

[12] Gilson v. Pennsylvania R. R. Co., 86 N. J. Law 446, 92 Atl. 59 (1914); Simpson v. Rourke, 13 N. Y. Misc. (N. Y. City Cts.) 230, 34 N. Y. Supp. 11 (1895).

ment while the patron is eating.[13] Note that in each of the above instances the wraps were placed in an easily accessible place known to the patron; there was no intention by the parties to create a bailment; there was not a sufficient delivery of the wraps; and with the questionable exception of the first two situations, there was no acceptance of the articles by the proprietor.

However, some courts hold that a bailment exists in situations where the removal of clothing is a necessary incident to the nature of the business in which the bailee makes a profit, thus making the proprietor a voluntary custodian of the clothing of the customer.[14] This has been applied to clothing stores where a customer lays aside clothing in order to try on goods offered for sale by the store.[15] The same result is reached where clothing is left in a room in a bathing house while the customer takes a bath,[16] where wraps are left in a dentist's reception room,[17] and where a coat is hung upon a hook on the wall in a barber shop.[18] Could not this principle be applied to a patron of a restaurant who removes his hat and coat and places them upon a hanger while he eats? Certainly this is a necessary incident to the business. However, the courts have declined to apply this principle generally. This principle has been applied only where the conditions have been such that the proprietor of the business did have or should have had an employee to see that the effects of the customer were safe. The limited application of this principle seems to be a just policy since a free application would place an excessive and unwarranted burden on the restaurant keeper.

The necessary conclusion is that in order to hold a restaurant keeper liable as a bailee of the effects of his patrons, there must be a sufficient delivery and acceptance so that a bailment is clearly created. However, a restaurant keeper may be held liable for negligence as to the effects of patrons.[19] The main objection to this rule is that the burden of proof of negligence falls upon the person claiming negligence,[20] in this case the patron; whereas, where a bailment

[13] Gilson v. Pennsylvania R. R. Co., 86 N. J. Law 446, 92 Atl. 59 (1914); Wentworth v. Riggs, 159 App. Div. 899, 143 N. Y. Supp. 955, 957 (1st Dept. 1913).

[14] 6 AM. JUR. 150.

[15] Bunnell v. Stern, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481 (1890); Woodruff v. Painter, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451 (1892); Goff v. Wannamaker, 25 W. N. C. 358 (Pa. 1889).

[16] Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 6 L. R. A. (N. S.) 828 (1906); Bird v. Everard, 4 N. Y. Misc. (N. Y. City Cts.) 104, 23 N. Y. Supp. 1008 (1893). *Contra:* Schneps v. Sturm, 25 N. Y. Misc. (Sup. Ct.) 168, 54 N. Y. Supp. 140 (1894).

[17] Webster v. Lane, 126 N. Y. Misc. (Sup. Ct.) 868, 212 N. Y. Supp. 298 (1925).

[18] Dilberto v. Harris, 95 Ga. 571, 23 S. E. 112 (1894).

[19] Montgomery v. Ladjing, 30 N. Y. Misc. (Sup. Ct.) 92, 61 N. Y. Supp. 840 (1899); Pattison v. Hammerstein, 17 N. Y. Misc. (Sup. Ct.) 375, 39 N. Y. Supp. 1039 (1896); Simpson v. Rourke, 13 N. Y. Misc. (N. Y. City Cts.) 230, 34 N. Y. Supp. 11 (1895).

[20] Smith v. Louisville & Nashville R. R. Co., 16 Ky. Law Rep. 887, 38 S. W. 209 (1895); 38 AM. JUR. 973-4; 45 C. J. 1162.

exists, the fact that the article is not returned raises a presumption of negligence and the burden of proof is on the bailee to put forth his defense.[21] However, since a proprietor is under a duty to keep the premises of his business in a safe condition for the effects of his customers,[22] a desirable increase in the proprietor's liability to protect the patrons of a restaurant from loss of clothing should be accomplished by raising the standard of care which the proprietor must exercise in relation to the effects of his patrons.

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[21] O'Malley v. Penn Athletic Club, 119 Pa. Super. 584, 181 Atl. 370 (1935); 6 AM. JUR. 459-60; 6 C. J. 1158; 8 C. J. S. 341; Note (1936) U. of Pitt L. Rev. 51, 54.

[22] Bunnell v. Stern, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481 (1890); Woodruff v. Painter, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451 (1892).